

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
J. DENTAL LAB, INC.	:	
AND HYUK JUNG	:	DETERMINATION
	:	DTA NO. 818398
for Revision of a Determination or for Refund of Sales	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
the Period June 1, 1996 through February 28, 1999.	:	

Petitioners, J. Dental Lab, Inc. and Hyuk Jung, 208 West 30th Street, #1103, New York, New York 10001, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1996 through February 28, 1999.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 28, 2001 at 11:00 A.M. with all briefs to be submitted by March 7, 2002. Petitioners appeared by Kang Youl Lee, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

ISSUE

Whether the receipts of J. Dental Lab, Inc. from the sale of inlays, onlays and laminates are subject to sales and use taxes.

FINDINGS OF FACT

1. Petitioner, J. Dental Lab, Inc. ("J. Dental"), is a firm which manufactures dental products. Mr. Hyuk Jung is the president of J. Dental.

2. During the periods in issue, J. Dental filed annual sales tax returns which reported that there were no taxable sales and that no sales tax was due.

3. On May 12, 1999, the Division of Taxation ("Division") mailed a letter to Mr. Jung which scheduled an appointment on May 24, 1999 to conduct a sales and use tax audit for the period June 1, 1995 through February 28, 1999. The letter requested that Mr. Jung have all of the books and records pertaining to J. Dental's sales and use tax liability available on the appointment date including "journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates."

4. In July 1999, J. Dental agreed that the audit should be conducted using a test period. On August 6, 1999, the representative for J. Dental executed a consent to extend the statute of limitations for the assessment of sales and use taxes for the period June 1, 1996 through November 30, 1996 to any time on or before December 20, 1999.

5. After reviewing financial statements, sales invoices and sales codes, Mr. Jung gave the auditor a tour of J. Dental and explained the manufacturing process for each of the products that the company sells. Thereafter, the auditor selected the months of March through May 1998 as a test period and determined that, during this period, sales tax had not been collected on the sales of inlays, onlays or porcelain laminates which were purchased by dentists for use in performing dental services for compensation. The Division found that, during the test period, J. Dental had taxable sales of inlays, onlays and laminates resulting in tax due of \$804.55. An error rate of 1.3893% was calculated by dividing the amount of tax found due during the test period by the

total amount of sales during the same period of time. The error rate was then applied to J. Dental's total sales resulting in tax due in the amount of \$8,801.36.

6. The Division issued a Notice of Determination (Assessment ID L-016997410-6), dated October 14, 1999, to J. Dental which assessed sales and use tax for the period June 1, 1996 through February 28, 1999 in the amount of \$8,801.36, plus interest in the amount of \$2,077.83 and penalty in the amount of \$2,290.31, for a balance due of \$13,169.50. The Division also issued a Notice of Determination (Assessment ID L-017007828-7), dated November 5, 1999, to Hyuk Jung, as a responsible officer of J. Dental, which assessed sales and use taxes for the period September 1, 1996 through February 28, 1999 in the amount of \$8,070.50, plus interest in the amount of \$1,824.51 and penalty in the amount of \$2,115.62, for a balance due of \$12,010.63. The assessment against Mr. Jung was less than the assessment against J. Dental because the consent to extend the statute of limitations only pertained to the corporation. As a result, at the time the assessment was issued to Mr. Jung, the Division believed that the first quarter of the audit period had expired and he was not assessed for this quarter.¹ The Division assessed a penalty because it concluded that there was an absence of reasonable cause as to why it should not be imposed.

7. On May 10, 2000, petitioners participated in a conciliation conference before the Bureau of Conciliation and Mediation Services. On the basis of the information submitted at the conference, the tax due for the test period was reduced to \$99.00 and projected to \$2,182.29 for the entire audit period. This is the amount which is currently sought from J. Dental and Mr. Jung. The basis for the reduction in tax was that petitioners had submitted letters from dentists

¹ Subsequently, the Division concluded that the statute of limitations had not expired because J. Dental was an annual filer.

showing that J. Dental had sold items which were used in an exempt manner. In addition, the penalties were waived.

8. The crowns prepared by J. Dental cover the entire tooth stump. In accordance with New York State Administrative Procedure Act § 306(4), official notice is taken that Boucher's Clinical Dental Terminology ("Boucher's") defines a complete crown as "[a] restoration that reproduces the entire surface anatomy of the clinical crown and fits over a prepared tooth stump."

9. An inlay is used to fill a gap caused by a small cavity. In order to create the inlay, J. Dental uses a form which is created from an impression made by a dentist. Boucher's defines an inlay as "restoration of metal, fired porcelain, or plastic made to fit a tapered cavity preparation and fastened to or luted into it with a cementing medium."

10. Laminates cover a tooth. They may be designed to cover a portion of the tooth or the entire tooth. One difference between a laminate and a crown is that metal is used on the inside of a crown. Boucher's defines laminate veneer restorations as:

[a] conservative esthetic restoration of anterior teeth to mask discoloration, restore malformed teeth, close diastemas, and correct minor tooth alignment. The materials of choice are acrylic veneers, processed composite resin veneers [sic] and/or porcelain veneers that are bonded directly to a properly prepared tooth.

11. An onlay is used to fill a large cavity. The term onlay is defined in Boucher's as:

1. A cast type of restoration that is retained by frictional and mechanical factors in the preparation of the tooth and restores one or more cusps and adjoining occlusal surfaces of the tooth. 2. An occlusal rest portion of a removable partial denture that is extended to cover the entire occlusal surface of the tooth.

12. The same steps are involved in making a crown, laminate or onlay. However, the material for each item is a little different.

13. At the hearing, the parties stipulated that Mr. Jung is a responsible officer of J. Dental and that the audit methodology used by the Division was reasonable and acceptable.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioners maintain that the items in issue are exempt from sales tax as prosthetic devices under Tax Law § 1115(a)(4). They submit that it does not make sense to distinguish crowns from inlays, onlays and laminates because each of these items is used for treatment. It is also noted that the items are manufactured for a particular patient. Lastly, petitioners' representative states that he has surveyed dental labs and was told that New York does not assess tax on dental laminates.

15. In response, the Division asserts that sales tax was properly imposed on the sale of inlays, onlays and laminates because they do not qualify as prosthetic devices under Tax Law § 1115(a)(4). Further, they were purchased by dentists for use in performing dental services for compensation.

CONCLUSIONS OF LAW

A. Sales and use taxes are imposed on the receipts from the retail sale of tangible personal property (Tax Law § 1105[a]; § 1110) except as otherwise provided in Article 28 of the Tax Law. The issue presented here is whether the receipts from the sale of inlays, onlays and laminates are exempt from said taxes.

B. Petitioners have the burden of proving that their sales are not taxable since Tax Law § 1132(c) creates a presumption that all receipts for property mentioned in Tax Law § 1105(a) are subject to tax unless the contrary is established. In *Matter of Blue Spruce Farms v. New York State Tax Commn.*(99 AD2d 867, 472 NYS2d 744, *affd on mem below* 64 NY2d 682, 485 NYS2d 526) the pertinent standard of review was set forth as follows:

Statutes creating an exemption are to be strictly and narrowly construed (*Matter of Mobil Oil Corp. v. Finance Administrator*, 58 NY2d 95, 98, 459 NYS2d 566; *Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 195, 371 NYS2d 715). The burden of proving entitlement to a tax exemption rests with the taxpayer (*Matter of Young v. Bragalini*, 3 NY2d 602, 605; 170 NYS2d 805). To prevail over the administrative construction, petitioner must establish not only that its interpretation of the law is a plausible one but, also, that its interpretation is the only reasonable construction (*see Matter of Lakeland Farms Co. v. State Tax Comm.*, 40 AD2d 15, 18; 336 NYS2d 972). Thus, unless the Department of Taxation and Finance's regulation is shown to be irrational and inconsistent with the statute (*Matter of Slattery Assoc. v. Tully*, 79 AD2d 761; 434 NYS2d 788) or erroneous (*Matter of Koner v. Procaccino*, 39 NY2d 258, 383 NYS2d 295), it should be upheld. (*Id.* at 867, 472 NYS2d 744.)

C. Section 1115(a) of the Tax Law provides, in relevant part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten * * * (4) Prosthetic aids * * * and artificial devices and component parts thereof purchased to correct or alleviate physical incapacity in human beings.

D. In accordance with the foregoing statutory provision, the Commissioner of Taxation and Finance has promulgated a regulation which states that “[p]rosthethic aids * * * and component parts thereof, purchased to correct or alleviate physical incapacity in human beings are exempt from the tax.” (20 NYCRR 528.5[a].)

E. The Commissioner's regulations provide that in order for property to be a prosthetic aid:

the property must either completely or partially replace a missing body part or the function of a permanently inoperative or permanently malfunctioning body part and must be primarily and customarily used for such purposes and not be generally useful in the absence of illness, injury or physical incapacity. *Example 1: Artificial hands, arms, legs, false teeth, etc. are exempt * * ** *Example 4: A crown which is permanently attached to a tooth by a dentist is exempt* (20 NYCRR 528.5[b];emphasis supplied).

F. The leading case on the issue presented in this matter is *Dental Society of the State of New York v. State Tax Commn.* (110 AD2d 988, 487 NYS2d 894, *affd on mem below* 66

NY2d 939, 498 NYS2d 797). In this case, the Court held that, in determining what constituted an exempt prosthesis, the distinction drawn by the State Tax Commission between false teeth and crowns, which were exempt, and those materials which were used to fill teeth, which were taxable, was not irrational (*id.*, 487 NYS2d at 896). In reaching this conclusion, the Court relied upon the ordinary meaning of the term prosthesis which is a device employed to replace a missing part of the body (*id.*, 487 NYS2d at 897). Following this definition, the Court determined that unlike dentures or crowns, the use of filling substances did not replace a missing body part but only guarded against further decay of existing teeth (*id.*).

G. The distinction which the Appellate Division accepted in the *Dental Society* case supports the position adopted by the Division in this matter. Unlike a crown, which replaces a tooth, the inlay, onlay and laminate repair or cover an existing tooth. Therefore, the latter items are not exempt from sales and use tax as a prosthesis within the meaning of the Tax Law. Petitioners' argument that the inlay, onlay and laminate are used for dental treatment is rejected because it does not address the criterion for an exempt prosthesis which is that the item is used to replace a missing body part. It is noteworthy that the Commissioner's regulations provide that:

Medical equipment and supplies purchased for use in performing medical or similar services for compensation are not exempt from tax * * * Example 4: Dental supplies such as porcelain, mercalloy, gold, silver, acrylic denture base, amalgam, composite resin, silicate, and dental floss are not exempt when purchased by a dentist who will use them in performing a dental service for compensation (20 NYCRR 528.4[h][1]).

It is clear from the forgoing regulation that an item is not exempt from tax merely because it is used for treatment.

H. Petitioners' contention that no other dental laboratories are paying sales tax appears to be a claim of selective enforcement. In order to establish a claim of selective enforcement:

there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification (*Matter of 303 W. 42nd St. Corp. v. Klein*, 46 NY2d 686, 416 NYS2d 219, 223).

I. Petitioners' allegations do not establish that the Division engaged in selective enforcement of the Tax Law against them. Therefore, there is no basis to consider the second element of the claim, i.e., that the selective enforcement was deliberately based upon an impermissible standard (*Matter of Billauer*, Tax Appeals Tribunal, August 6, 1998; *Matter of Petro Enters.*, Tax Appeals Tribunal, October 15, 1992).

J. The petition of J. Dental Lab, Inc. and Hyuk Jung is denied.

DATED: Troy, New York
July 25, 2002

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE